

APPEAL NO. 051952
FILED OCTOBER 4, 2005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on June 20 and concluded on August 8, 2005. With regard to the only issue before him the hearing officer determined that the respondent's (claimant) impairment rating (IR) is 19% as assessed by the designated doctor whose amended report is not contrary to the great weight of the medical evidence.

The carrier appeals, contending that the amended 19% IR is incorrect, that the designated doctor's original report has presumptive weight and that the hearing officer should have granted the appellant's (carrier) Motion for Summary Judgment. The claimant responds generally requesting affirmance, rebutting the carrier's various arguments made at the CCH and on appeal and conceding that "the rounding corrections would yield an 18% [IR]."

DECISION

Reversed and a new decision rendered.

The parties stipulated that the claimant sustained a compensable injury on _____, and that (Dr. B) is the designated doctor. In a report dated November 13, 1995, Dr. B certified "statutory maximum medical improvement (MMI)" (see Section 401.001(30)(B)) and assessed a 14% IR using the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). Dr. B assessed a 6% impairment from Section (II)(C) Table 49, 0% impairment for neurological deficits and 8% impairment for loss of range of motion (ROM). Neither the MMI date, specific disorder rating from Table 49 nor the 0% impairment for neurological deficits are challenged. Dr. B's report showed:

Cervical flexion 26° 2% IR Table 51

Cervical extension 16° 4% IR Table 51

Cervical right lateral flexion 29° 1% IR Table 52

Cervical left lateral flexion 35° 1% IR Table 52

Cervical right and left rotation from Table 53 was invalidated "secondary to lack of effort on the patients part" based on observed ROM.

The claimant, in a letter dated February 3, 2004, to a Texas Department of Insurance, Division of Workers' Compensation (Division) DDO challenged the ROM ratings on the basis that Dr. B had "improperly 'rounded up' the [ROM] measurements in violation of [Division] directives" citing some Appeals Panel Decisions. The claimant, in that letter requested that Dr. B be asked certain questions about rounding up including

the questions that “Assuming the cervical [ROM] loss is rated at 13%, would that combine with the 6% Table 49 rating to yield an 18% whole person [IR].”

Similar argument was made at the first session of the CCH. The hearing officer at that session decided to send a letter requesting clarification to Dr. B. Dr. B responded by letter (and an Amended Report of Medical Evaluation (TWCC-69)) stating that at the time of his examination (in 1995) “a rounding was appropriate” but subsequently “rounding would be considered not appropriate and is not allowed.” Dr. B stated:

With this in mind, cervical flexion of 26 degrees would yield a 4% whole person impairment, and cervical extension at 16 degrees would yield at 6% whole person. Right lateral flexion at 29 degrees would yield a 2% whole person impairment, and a left lateral flexion at 35 degrees would yield a 1% whole person impairment. With these Appeals Panel decisions in mind the patient’s impairment rating would change from a 14% to a 19% whole person impairment.

At the second session of the CCH on August 8, 2005, the carrier filed a Motion for Summary Judgment and the methodology of how the ROM impairments were calculated was discussed. The claimant in closing said that he believed the correct IR was 18% but did not give a reason for that belief. The hearing officer ruled that there are no provisions in the 1989 Act or Division Rules to allow action to be taken on the Motion for Summary Judgment and determined that the claimant’s IR was 19% as assessed by Dr. B in his amended report.

As for the Motion for Summary Judgment we agree with the hearing officer and hold that his ruling on that point was not in error.

The carrier in its appeal contends that “both the Carrier and the Claimant agree that the Designated Doctor is incorrect in his new [IR].” The carrier does not contend that the designated doctor should be allowed to “round up” his ROM measurement but rather the doctor should have invalidated all the ROM ratings based on clinical observation (as he did the rotation ROM). The hearing officer did not err in accepting the amended ROM impairments.

According to Dr. B’s amended ratings that 26° of cervical flexion yields a 4% IR; 16° of cervical extension yields a 6% IR; 29° of right lateral flexion yields a 2% IR; and 35° of left lateral flexion yields a 1% IR, the claimant would have 13% impairment for loss of ROM in addition to the 6% impairment from Table 49 to arrive at the 19% IR. Section 3.3a, beginning on page 71 of the 3rd AMA Guides instructs on the general principles of measurements of the spine. More specifically on Page 72 the Guides instruct how to calculate ROM and on Page 74 instructs to add all ROM impairment values for one region (in this case the cervical spine) and then to “obtain the impairment of the whole person due to the impairment of the region of the spine, use the Combined Values Chart to combine the diagnosis-based impairment(s) with the impairment due to

limited [ROM].” Using the Combined Values Chart on Page 246 and combining the 13% ROM impairment with the 6% diagnosis-based impairment results in an 18% IR. We hold that the hearing officer erred in adding the impairments when they should have been combined as instructed on Page 73 of the Guides. The Appeal Panel has held on several occasions the correct use of the Combined Values Chart is in the nature of a mathematical or clerical error and does not involve resort to medical judgment. Appeals Panel Decision (APD) No. 000028, decided February 22, 2000; APD No. 011051, decided June 26, 2001. See *a/so Old Republic Insurance Company v. Rodriguez*, 966 S.W.2d 208 (Tex. App.-El Paso 1998, no pet.). In that the Appeals Panel can no longer affirm a decision as reformed (see Section 410.203(a)) we must reverse the decision of the hearing officer.

Accordingly, we reverse the hearing officer decision that the claimant’s IR is 19% and render a new decision that the claimant’s IR is 18%.

The true corporate name of the insurance carrier is **CONTINENTAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Margaret L. Turner
Appeals Judge